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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1442

ROLAND V. COLGROVE

Petitioner,

vs.

HONORABLE JAMES F. BATTIN
U.S. District Judge for the District of Montana

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

Brief for the National Emergency Civil Liberties Committee Amicus Curiae

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INDEX

	Page
Table of Authorities	i
Notice of Motion for Leave to File	1
Question Presented	2
Statement of the Case	3
Argument	3
I. The Context Within Which This Case Is Brought Before the Court	5
II. The Seventh Amendment Requires That Civil Juries Continue to Be Composed of Twelve Persons	7
III. *Williams v. Florida* Is Not Dispositive of This Case	10
IV. *Williams v. Florida* Was Based on the Incorrect Premise That Six-Person Juries Function in the Same Manner as Do Twelve-Person Juries	14
V. The Twelve-Person Jury Must Be Retained If We Are to Retain Our Democratic Values	19

TABLE OF AUTHORITIES

Cases	Pages
Apodaca v. Oregon, 406 U.S. 404 (1972)	11, 13, 14
Byrne v. Matczak, 254 F.2d 525 (3 Cir. 1958), cert. denied 358 U.S. 816	9
Capital Traction Company v. Hof, 174 U.S. 1 (1899)	3, 4, 8, 11, 12
Colgrove v. Battin, 456 F.2d 1379 (9 Cir. 1972)	11
Cooley v. Strickland Transportation Company, 459 F.2d 779 (5 Cir. 1972)	5, 12, 13
Fox v. United States, 417 F.2d 84 (5 Cir. 1969)	9, 10
Galloway v. United States, 319 U.S. 372 (1943)	8, 9, 19
In re Peterson, 253 U.S. 300 (1920)	8
Jacob v. New York, 315 U.S. 752 (1942)	19
Parsons v. Bedford, Breedlove & Robeson, 3 Pet. (28 U.S.) 433, (1830)	7
Ross v. Bernard, 396 U.S. 531 (1970)	9
Williams v. Florida, 399 U.S. 78 (1970)	4, 10, 11, 13, 14, 15, 18

Constitutional Provisions	
First Amendment	2
Fifth Amendment	2
Sixth Amendment	13
Seventh Amendment	2, 7, 8, 9, 10, 11, 12, 14, 19
Fourteenth Amendment	2, 14

Other Authorities

	Pages
Chesterton, Tremendous Trifles (1920)	21
Comment, *Florida's Six-Member Criminal Juries: Constitutional, But Are They Fair?* 23 U.Fla.L. Rev. 402 (1971)	18
Henderson, *The Background of the Seventh Amendment*, 80 Harv.L.Rev. 289 (1966)	7
Juror Utilization in United States Courts (Administrative Office of the U.S., August 13, 1971)	6
Kalven, *The Dignity of the Civil Jury*, 50 Va.L.Rev. 1055 (1964)	7
Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 Loyola of L.A.L.Rev. 1 (1972)	20
Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case Western Res.L.Rev. 529 (1971)	18
Scheflin, *Jury Nullification: The Right To Say No*, 45 S.Cal.L.Rev. 168 (1972)	20
Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U.Chi.L.Rev. 710 (1971)	16

Rules

Federal Rules of Civil Procedure:	
Rule 83	12, 13
Revised Rules of Procedure for the United States District Court:	
Rule 13(d)(1)	3
Rules of the Supreme Court of the United States:	
Rule 42(3)	1

Statutes

28 U.S.C. 1414(b)	3
42 U.S.C. § 1983	6

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NOTICE OF MOTION FOR LEAVE TO FILE

This is a motion of the National Emergency Civil Liberties Committee for leave to file a brief *amicus curiae.*

The National Emergency Civil Liberties Committee respectively moves for leave to file a brief as *amicus curiae* pursuant to rule 42(3) of this Court. We have not formally requested permission from the parties to this action, because we learned from counsel for the California Trial Lawyers Association—who is also requesting permission for leave

to file a brief *amicus curiae*—that permission was denied by the respondents. We were unable to file this brief within the time allotted to petitioners for filing their opening brief because our chief counsel, Leonard Boudin, was unexpectedly called back to work on the case of Daniel Ellsberg in Los Angeles, and his partner, Victor Rabinowitz, has been stricken with hepatitis. We pray that the Court will accept this brief under its rule 42(3) as timely filed, despite the several-day delay.

The interest of the National Emergency Civil Liberties Committee is prompted by the nature of our organization which is an unincorporated association organized for the purpose of protecting and defending the civil liberties and civil rights of the people of the United States. The association is particularly concerned with the rights of the people guaranteed by the First, Fifth, Sixth, Seventh, and Fourteenth Amendments of the United States Constitution and has from time to time filed briefs *amicus curiae* in this and in other courts in cases involving substantial civil liberties questions. The interest of *amicus* herein arises from the critical bearing this case has on a cardinal constitutional principle: that twelve members are an essential feature of the jury system.

The question is a complex one and we believe the brief of this association will be of assistance to the Court.

QUESTION PRESENTED

Does the guarantee in the Seventh Amendment of the United States Constitution that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." permit the use of juries composed of fewer than 12 persons in federal civil trials?

STATEMENT OF THE CASE

Petitioner brought an action for libel in the U.S. District Court for the District of Montana. Jurisdiction of the case was invoked under 28 U.S.C. 1414(b). Pursuant to rule 43(d)(1) of the Revised Rules of Procedure for the U.S. District Court, which became effective on September 1, 1971, this matter was set for trial before a jury consisting of six persons. Plaintiff moved to try the matter before a jury of 12 persons, but this motion was denied. Subsequently, the petitioner sought a writ of mandamus from the U.S. Circuit Court of Appeals for the Ninth Circuit, but this was denied on March 6, 1972.

ARGUMENT

The historically validated twelve-member federal civil jury has recently been displaced in thirty-two federal districts by local rules which reduce the size of the jury to six-members. The reasons given for this change in jury structure are greater efficiency and lower operating cost. But either of these reasons is sufficient to overcome the strong intention of the Seventh Amendment to preserve the substance of the civil jury as it was understood by the Founding Fathers. In addition, the time and the costs saved are minimal, especially in the context of weakening the dignity of the civil jury.

The Seventh Amendment, both in historical context and current interpretation, mandates a twelve-member federal civil jury. While new procedural reforms are permissible to expedite trials and improve the quality of evidentiary rules, no basic tampering with the substance of the jury itself is allowable. In *Capital Traction Company v. Hof*, 174 U.S. 1 (1899), the Seventh Amendment was interpreted to require twelve-member juries. That decision is controlling

and cannot be overruled by the actions of thirty-two district courts and two courts of appeal. Only the Supreme Court can reverse its own decisions. But *Capital Traction* is sound law and should be re-affirmed.

In *Williams v. Florida*, 399 U.S. 78 (1970), a six-member jury in a state criminal trial was sustained against constitutional attack on Sixth Amendment grounds. But principles of federalism allow jury reform on the state level while forbidding such changes on the federal level. In *Williams* this Court specifically left open the issue in the instant case and *Williams* is therefore not dispositive of the question of whether the Seventh Amendment permits a six-member federal civil jury. In addition, *Williams v. Florida* was based upon the premise that there would be no significant difference in the performance of the six-member and twelve-member juries. But this premise is inaccurate since proof is available that the six-member jury will function in an entirely different way, and thereby reach different verdicts than, a twelve-member jury. The six-member jury will violate principles of drawing juries from representative cross-sections of the community and this jury will less accurately reflect the consensus of the community than will the twelve-member jury.

The jury has traditionally been a pillar of democracy and a means by which lay persons become a functioning part of government. Arguments of economic efficiency are not strong enough to risk the weakening of our democratic principles entailed in curtailing the full breadth of the jury system. The threat of the total abolition of the jury, now being argued in many circles, requires that the democratic nature of the jury system, as the essence of our constitutional form of government, be once again re-affirmed in clear terms. To protect our basic freedoms the jury structure as it is now constituted must be upheld.

I. THE CONTEXT WITHIN WHICH THIS CASE IS BROUGHT BEFORE THE COURT.

The present case is not an isolated matter brought before this Court from the distant plains of Montana. Rather it is the vehicle by which an issue of great importance affecting the entire country is to be decided. During the past two years there has been a movement in the federal courts and in some of the state courts to reduce the size of civil juries. According to an appendix published at the end of *Cooley v. Strickland Transportation Company*, 459 F.2d 779, 786 (1972), 32 of the 90 federal district courts have adopted a policy of reducing the size of civil juries with regard to at least some kinds of litigation. These reductions are explained on grounds of efficiency and because of a view that civil juries are of less importance and dignity than criminal juries. Before addressing the legal and policy issues involved these preliminary matters must be considered.

The efficiency argument involves both the length of trials and their costs. Reduction in the size of the jury, it is contended, will result in speedier trials and less cost to the taxpayers. Even if both of these contentions are true, the savings are relatively minimal. Jury selection, under a system in which the judge conducts the voir dire, speaking generally to the entire panel and only occasionally to individual jurors, is not significantly different if 12 jurors are to be selected or if six are to be selected. In both instances, the judge must describe the case and ask the jurors general questions about bias. The process of challenge will be lengthened a bit, but hardly more than a few minutes in the normal trial. During the conduct of the trial, the size of the jury will make absolutely no difference in the time required, and then during deliberation a 12-person jury might take a bit longer but only if there are issues that require discussion. While the jury is deliberating the judge

is free to conduct other business; the size of the jury is then irrelevant at this stage. It seems improper in any event to try to exact time saving at the expense of a full and frank discussion of the complex issues to be decided.

The monetary expense involved in paying fewer jurors is again not of great significance and should not carry substantial weight where constitutional rights are involved. A recent report of the Administrative Office of the United States Courts estimates that if *every* district court reduces the size of its juries to six for *every* civil case, the saving would be only $1,799,600, a figure that is only about 1.5 percent of the federal judicial budget and an infinitesimal fraction of the entire U.S. budget *JUROR UTILIZATION IN UNITED STATES COURTS* (Aug. 13, 1971). We are thus talking about nickel and dime savings at the expense of a right that Anglo-Saxons have fought for over the course of several centuries.

The argument that juries in civil cases are somehow less important than in criminal cases is also an inappropriate argument in this context. Certainly the writers of the Bill of Rights did not agree with this distinction, because they made special provisions to protect both the right to trial by jury in civil cases and the right to trial by jury in criminal cases. The right to a trial by a jury of peers is just as crucial in the civil setting as it is in the criminal context. One need only think of the issues raised in cases brought under 42 U.S.C. sec. 1983 to realize the importance of having fellow-citizens passing judgment on the controversies. And in libel cases, such as the one presently under consideration, the need for a body of lay persons has always been recognized to protect both the crusading journalists who may speak harshly of the government and also the powerless citizen slandered by the powerful organs of the press and the airwaves. The issues involved in these

cases are too crucial to allow them to be taken from a panel that is truly representative of the citizenry. See Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

II. THE SEVENTH AMENDMENT REQUIRES THAT CIVIL JURIES CONTINUE TO BE COMPOSED OF TWELVE PERSONS.

The historical background still extant of the Seventh Amendment is unfortunately meager. What little documentation we possess describing the genesis of this amendment does indicate quite clearly, however, that the Seventh Amendment was added to the Bill of Rights because of the strong pressure levied by the anti-federalists who feared that the civil jury would ultimately be abolished unless protected in straight-forward language. It was to preserve the civil jury as it was then understood that a separate amendment was added to the Bill of Rights providing explicitly that the right to trial by jury at common law shall not be denied to any litigant. See Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966). "One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." *Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. (28 U.S.) 433, 446.

Although the Seventh Amendment appears clearly to preserve the common law jury in all cases where such a jury trial was permitted in 1791, some confusion has arisen over the interpretation of this provision. Legislative history indicates that the Federalists resisted its inclusion in the Bill of Rights because of the great difficulty of finding appropriate wording to cover the different civil jury trial procedures of the states. Since there was no federal practice to draw on, and since state practices varied so widely, any language that would satisfy adherents of the jury

would necessarily be general. As a result, the Seventh Amendment was not intended to describe definitively all facets of jury practice, but rather was intended to emphasize the grave importance attached to the civil jury as it was then understood. While evidentiary practice differed in equity which were not, it is clear that by "jury" the dividing line between cases at law tried by jury and suits in equity which were not, it is clear, that by "jury" the understanding in all states was a twelve-member lay panel having exclusive right to determine the facts at issue. Cutting the size of the jury in half, especially for reasons of efficiency and economy, constitutes precisely the sort of threat to the institution of the civil jury that led to the inclusion of the Seventh Amendment in the first place.

The Supreme Court has consistently recognized that the Seventh Amendment mandates a jury of twelve. In *Capital Traction Company v. Hof*, 174 U.S. 1 (1899), the Court stated that "trial by jury is a trial by a jury of twelve men . . ." *Id.* at 13-14. For 73 years this has been the controlling interpretation of the Seventh Amendment until reversed by two United States Courts of Appeal this year.

Constitutional interpretation of the Seventh Amendment in this century has of course recognized that certain procedural changes could be made. The rules of evidence, the procedures for expediting trials, and the methods for determining what facts are actually at issue can all be changed, in just the same manner that in 1791 each state was allowed to have its own rules on these subjects. *In re Peterson*, 253 U.S. 300 (1920); *Galloway v. United States*, 319 U.S. 372 (1943). But the basic structure of the civil jury on which all states agreed in 1791 cannot be changed if the Seventh Amendment is to have any continuing meaning.

Extensive research has not produced one citation involving tampering with the basic structure of the jury. All of the decisions of this Court authoritatively explicating the meaning of the jury trial guarantee in civil cases have dealt either with whether an issue was originally at law or in equity, *Ross v. Bernard*, 396 U.S. 531 (1970), or with the division of function between the judge and the jury, with particular reference to directed verdicts and jury instructions. *Galloway v. United States, supra.* No case ever brought to the Supreme Court on a Seventh Amendment basis involved a revamping of the nature of the jury itself. And no case in the lower federal courts has allowed the basic understanding of the jury to be altered.

In two cases, decided by U.S. Courts of Appeal, a Seventh Amendment argument was directed at the jury itself. In *Byrne v. Matczak*, 254 F.2d 525 (3 Cir. 1958) cert. den. 358 U.S. 816, the presiding judge in a civil trial allowed the jurors in the midst of deliberation to return to their homes for the evening. The jury had deliberated for over six hours and when they returned in the morning they were asked whether they obeyed the judge's instructions not to discuss the case with anyone while they were home. The jury deliberated for another seven hours before reaching its decision. No prejudice was shown in allowing the jury to retire to their homes and no objection was made at the time. Under these circumstances, although this practice was impermissible at common law, it was upheld as not violative of the Seventh Amendment. It is clear that this case did not involve a question of what constitutes a jury and would not have increased the anti-federalist fear of abolition of the civil jury, which provided the basis for the inclusion of the Seventh Amendment.

In *Fox v. United States*, 417 F.2d 84 (5 Cir. 1969), one juror remained silent while the jury was being polled after its verdict. The jury was dismissed but an affidavit was

later filed detailing the fact that this one juror never agreed to the verdict. The trial judge held that the verdict could not be impeached but the Fifth Circuit reversed holding that a verdict means the unanimous consent of twelve jurors. It is submitted that *Fox* is both rightly decided and relevant to the issue in the present case. In *Fox* there was a basic change in the concept of the jury: eleven out of the twelve jurors reported a verdict representing it as the decision of the jury. They did so not realizing that unanimity was required but their act was nevertheless a substantial alteration of the meaning of the jury as it was understood both at common law and at present. The basic alteration in the concept of the jury that was entailed was correctly found to violate the Seventh Amendment. It is just such an alteration in the basic understanding and purpose of the jury that we confront in this case. We learn from the Seventh Amendment's background that the proper question to ask is: does the jury reform represented here constitute a threat to the existence and central importance of the civil jury? Or, put in its historical context, if the jury reform proposed here were presented to the anti-federalists at the time of the Constitutional Convention would they have accepted it or would they have viewed it as an attack on the integrity of the civil jury? We believe that the attempt to slice the jury in half in all cases is a threat to the viability of the civil jury and a way station on the road to its ultimate demise for artificial reasons of economy. We further believe that the anti-federalists would have preceived it in precisely the same way.

III. WILLIAMS v. FLORIDA IS NOT DISPOSITIVE OF THIS CASE.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court upheld the constitutionality of a Florida statute authorizing six-member juries in criminal cases. Despite sweeping

language in the majority opinion, this case did not decide whether federal criminal practice would constitutionally permit less than twelve-member panels, nor did it decide whether civil federal practice, under the Seventh Amendment, would support six-member juries. Thus *Williams* was a state criminal case under the Sixth and Fourteenth Amendments whereas this case is a federal civil case under the Seventh Amendment. Despite these obvious differences, two federal Courts of Appeal made the leap of faith and applied *Williams* to federal civil practice, thus reversing a Supreme Court decision (*Capital Traction Company v. Hof*, 174 U.S. 1 (1899)) which has been good law unchallenged for 73 years.

The Ninth Circuit in the instant case recognized that the majority opinion reserved the question whether the *Williams* result would also apply under Seventh Amendment analysis. In *Williams* the Court specifically noted that "we do not decide whether . . . additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation." 399 U.S. at 92, fn. 30. Nevertheless, the Ninth Circuit held that the reasons for deciding *Williams* apply with "equal force" to this case. The Court further concluded that the references to the common law in the Seventh Amendment do not purport to "define the jury or trial by jury in terms of the common law." 456 F.2d at 1380. With all due respect it appears that the Ninth Circuit has missed the essential fact of *Williams*: that principles of federalism may give the states some leeway to experiment with criminal justice systems without being bound to federal practice in all particulars. This facet of *Williams*, strongly emphasized in Mr. Justice Harlan's concurring opinion and echoed in Mr. Justice Powell's concurring opinion in *Apodaca v. Oregon*, 406 U.S. 404, 366 (1972), still leaves open the question of whether federal

practice can substantially curtail the common law concept of the civil jury. At present, the answer is supplied by *Capital Traction:* the Seventh Amendment means a twelve-member jury. We are frankly not aware of any principle authorizing a United States Court of Appeals to reverse a clear holding of the United States Supreme Court on the assumption that the Court has decided an issue which it stated it clearly reserved.

In *Cooley v. Strickland Transportation Company,* 459 F.2d 779 (5th Cir. 1972), further light is shed on the process by which a lower court overrules a higher one. Federal Rule of Civil Procedure 83 requires that any change in district court rules be furnished to the Supreme Court. The Fifth Circuit states that "We interpret the Supreme Court's receipt of the local rule without objection as indicating tacit approval of the rule. As a subordinate federal court, we are reluctant to overturn a local rule to which the Supreme Court has not objected." 459 F.2d at 785. It should be noted that Rule 83 merely directs district courts to send copies of changes in procedures to the Supreme Court, it does not require the Court to approve them or in any way respond to them. As was pointed out in Judge Coleman's dissenting opinion, the Supreme Court does not render advisory opinions and in the absence of a case or controversy, the Supreme Court does not speak. Even further, the Supreme Court does not render advisory opinions by silence. 459 F.2d at 790. Since *Capital Traction* is still good law, the Fifth Circuit must have concluded that the Supreme Court tacitly overruled a 73-year old case, which constitutes the definitive treatment of the issue in controversy, by remaining silent. If this view were to be accepted, any precedent of the Supreme Court could be reversed by a lower

federal district court simply by sending a written message to the Supreme Court pursuant to Rule 83 of the Federal Rules of Civil Procedure and waiting for no response. The Supreme Court has a heavy enough caseload without having to decide cases *sub silentio*. The dangerous practice approved of by the Fifth Circuit must be emphatically rejected.

Cooley also makes the leap of faith from *Williams* to the federal civil jury. It does so by noting that it "would be anomalous to the point of irrationality to construe the Constitution as sanctioning a six-member criminal jury but not sanctioning a six-member civil jury." 459 F.2d at 781. But it is not irrational to recognize that the Constitution may have sanctioned a *federal* twelve-member jury in both civil and criminal cases but permitted a *state* to modify the jury to allow for six-member juries. The court in *Cooley* recognized the fact that *Williams* involved a state court jury but concluded that the theory that the Bill of Rights should be applied to the states through the Due Process Clause of the Fourteenth Amendment in a "watered down" version has not prevailed. Rather, the incorporationalist view which unifies state and federal practice is the current correct interpretation of matters of constitutional federalism. But this is precisely the issue at stake. Since *Williams* did not reach the question of federal practice, we do not know whether the full Court would apply the incorporationalist view or not. Some evidence of the Court's thinking can be gleaned from the most recent jury case decided by the Court. *Apodaca v. Oregon*, 406 U.S. 404 (1972). At issue in this case was the Sixth Amendment guarantee of right to trial by jury and the question of whether the states could constitutionally accept less-than-unanimous verdicts in criminal trials. Four justices held that unanimity was not constitutionally required in state criminal jury verdicts,

four justices held that it was, and Justice Powell cast the swing vote in favor of allowing the states some elbow room to experiment. Justice Powell clearly rejects the major premise of the majority opinion which he sees as being "that the concept of the jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment." Echoing Justice Harlan's concurring opinion in *Williams*, Justice Powell goes on to state that "the process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to, the limitations on that right as it was known in criminal trials at common law." *Id.* at fn. 6. It seems reasonable to conclude, therefore, that since the Court has not faced directly the question of federal jury practice, and since the Court is obviously divided over proper construction of the concept of "jury", and since the personnel on the Court differs from the Court which decided *Williams*, it is not possible at this time to predict just what result the Court will reach in construing the Seventh Amendment guarantee of trial by jury in federal civil cases. The Fifth Circuit, in avoiding any reference to *Apodaca*, fails to comprehend the important difference between *Williams* and the Seventh Amendment challenge in federal civil cases.

IV. WILLIAMS v. FLORIDA WAS BASED ON THE INCORRECT PREMISE THAT SIX-PERSON JURIES FUNCTION IN THE SAME MANNER AS TWELVE-PERSON JURIES.

The majority opinion in *Williams* regarded the requirement of twelve jurors as an "historical accident" with significance only to "mystics." 399 U.S. at 102. According to the Court there is no magic in the number 12 and, viewing the jury in terms of its function and purpose, the requirement that the jury consist of twelve persons is not consti-

tutionally mandated. But then the question becomes one of determining what size a jury must be in order to still function in its historic role. The majority opinion responds that the "number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." 399 U.S. at 100. In important language the Court then asserted what must assuredly be the lynchpin of its decision: "the reliability of the jury as a factfinder hardly seems likely to be a function of its size." 399 U.S. 100-101. Even further, Justice White asserted that he was confident that there would be "no discernible differences between the results reached by the two different-sized juries." 399 U.S. at 101. With regard to the requirement that the jury be a representative cross section of the community, Justice White concluded:

> As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, . . . the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one. (399 U.S. at 102.)

Obviously then the *Williams* case has as its major premise the fact, empirically verifiable or refutable, that six-member juries will not exclude significant community viewpoints that would be heard if the twelve-member jury were retained. In this regard, we observe that the Constitution does not allow the states to decrease the quality of justice to which a litigant or defendant is entitled. Rather, under principles of federalism the states are free to experiment with different methods to achieve the same goals and to protect zealously the same liberties. If in fact the state experiment fails—if a poorer quality justice is delivered—then the Constitution would forbid the practice from continuing. In the *Williams* case the issue was the six-member

state criminal jury. The Court allowed the states the opportunity to use smaller juries because the Court did not believe that a poorer quality of justice would result. If in fact empirical data becomes available showing that the constitutional guarantee of a representative jury cannot be met, or is seriously diluted, by the decreased jury size, then the Constitution must forbid the reduced jury size.

Professor Hans Zeisel, one of the foremost authorities on the American jury system, has recently demonstrated that a significant difference *does* exist between the six-member and the twelve-member jury and this difference contradicts Justice White's assumptions on the relative performance of both juries. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U.CHICAGO L.REV. 710 (1971). Professor Zeisel reviews the articles cited by Justice White to support his view that no significant difference exists between the operation of the six- and twelve-member juries, and shows that only the flimsiest of evidence supports that view. Most of the articles cited by Justice White were not even based on data at all but rather on the opinions of judges and clerks. Professor Zeisel then proceeds to demonstrate that the six-member jury functions quite differently from its historically legitimated counterpart.

The heart of the jury concept is the fact that each juror comes to the case with different perceptions and viewpoints. If we all saw the same there would be no reason for a jury. The constitutional mandate that juries be drawn from a representative cross-section of the community recognizes this fact. Suppose that in a given community, 90% of the people share one viewpoint and the remaining 10% have a different viewpoint. Suppose further that we draw 100 twelve-member and 100 six-member juries. According to Professor Zeisel, approximately 72 of the twelve-member juries would

contain a representation of the 10% minority as compared to only 47 juries composed of six persons. *Id.*, at 716. This is by no means a "negligible" difference.

Professor Zeisel also demonstrates that this same disparity of performance occurs in civil juries: the proof is a bit more complex, but worth reproducing here because of the importance of the demonstration. Suppose, says Professor Zeisel, that for a given injury one-sixth of the community's population would award the victim $1,000, another one-sixth would give him $2,000, a third one-sixth would award him $3,000, a fourth one-sixth would award him $4,000, a fifth one-sixth would value the injury at $5,000, and the final one-sixth would place a value of $6,000 on the injury. The community's average valuation would therefore be $3,500. Our goal should be to build a jury system in which the jury will serve as a microcosm for the community from which it is drawn and in which most juries would give the victim about $3,500. If 100 12-person and 100 six-person juries were assembled and given the case just discussed they would render awards fluctuating in a pattern as listed in the following chart:

PERCENT DISTRIBUTION OF THE AVERAGE EVALUATION BY 100 RANDOMLY SELECTED JURIES

Interval	Twelve-member	Six-member
$1,000-1,499	—	0.1
$1,500-1,999	0.1	1.4
$2,000-2,499	2.0	6.4
$2,500-2,999	13.7	16.4
$3,000-3,499	34.2	25.7
$3,500-3,999	34.2	25.7
$4,000-4,499	13.7	16.4
$4,500-4,999	2.0	6.4
$5,000-5,499	0.1	1.4
$5,500-6,000	—	0.1
Totals	100.0	100.0

Id., at 717

According to these figures, 68.4 percent of the verdicts of 12-person juries will fall between $3,000 and $4,000, approximating the community's consensus. If six-person juries are used, however, only 51.4 percent of the verdicts will fall within that desired range. In addition, if six-person juries are used 15.8 percent of the verdicts will fall below $2,500 or above $4,500, results that greatly distort the community's consensus on this question; if 12-person juries are used only 4.2 percent of the verdicts will fall in these outer limits. It seems clear from this demonstration that the selection of the size of juries at the number 12 was not just the result of a mystical incantation. When 12 persons deliberate together the chances that their verdict will accurately reflect the community's view on the question at hand are significantly higher than if it is a smaller group that is deliberating. Professor Zeisel concludes that if fewer than 12 persons are permitted to sit on federal juries, then the times when the verdicts will correspond with the community's view on the issue will inevitably and substantially decline. Confirmation of many of these points may be found in Comment, *Florida's Six-Member Criminal Juries: Constitutional, But Are They Fair?*, 23 U.Fla.L. Rev. 402, 408 (1971). See also Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case Western Reserve L.Rev. 529 (1971) for further proof of the dissimilarity in performance of the two juries.

It would seem clear that the data being analyzed shows that the premise for *Williams* was dead wrong. Six-member juries fail significantly to achieve representative cross-sectional requirements and jury verdicts differ widely from their twelve-member counterpart. Both criminal and civil cases are thus affected by reducing jury size. We are thus no longer dealing with a matter of procedure but rather

with a substantive aspect of the concept of the jury itself. To the extent that juries become homogenized by reducing the size, the fundamental right to a fair trial before a fairly selected jury dissipates in strength. It was against this weakening of the civil jury trial that the Seventh Amendment was promulgated.

V. THE TWELVE-PERSON JURY MUST BE RETAINED IF WE ARE TO RETAIN OUR DEMOCRATIC VALUES.

Almost thirty years ago Mr. Justice Black warned in a dissenting opinion that the majority decision marked "a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway v. United States*, 319 U.S. 372, 397 (1943). Justice Black found it necessary to remind his colleagues of the duty to protect the institution of the civil jury trial which the Court had enunciated in the past:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York, 315 U.S. 752, 752-53 (1942).

Without question the issue before this Court represents the severest threat to the integrity of the jury yet experienced under the Seventh Amendment. The importance of the Court's ruling is reflected in the fact that 32 districts have already moved to six-member juries on grounds of economy, efficiency and expedition of trials and court calendars. The deathknell of the common law jury of twelve

will be sounded should this Court fail to acknowledge the purpose behind the inclusion of the Seventh Amendment in the Bill of Rights. Within the last two years this Court has allowed the states to reduce jury size and accept non-unanimous jury verdicts. Now the attempt is being made to accomplish the same objectives in the federal system. Should that attempt succeed, we will see the end of the jury as the Founding Fathers knew it. We may even see the end of the jury entirely. A recent article by Robert Kessler outlines the strategy for accomplishing this goal. Referring to the jury as "dysfunctional" (can one imagine saying that to Thomas Jefferson?), Kessler concludes:

> Total abolition of the jury will, of course, require more than a jejune reconstruction of constitutional provisions. As a stopgap measure pending more significant reform, all states should consider at least the enactment of statutes containing provisions for less than unanimous verdicts and for six rather than twelve man juries.

Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 Loyola-LA L.Rev. 1, 31-32 (1972). One is tempted to conclude that Kessler's error is not so much in thinking the way he does but rather in letting the cat out of the bag.

Certainly this Court does not have to be reminded of the strong connection between the jury and the operational principles of a constitutional democracy. See Scheflin, *Jury Nullification: The Right to Say No*, 45 So.Cal.L.Rev. 168, 185-92 (1972). Studies conducted by the Chicago Jury Project show that jury service enhances feelings of the legitimacy of the judicial process and the democratic nature of the government. *Id.*, at 189-90. Diminution of the size of the jury will increasingly move the law further away from the people it was designed to serve. The ability of the

judicial process to achieve public confidence and support will become more attenuated as the courts move further away from lay participation of all members of the community. Surely it is not too high a cost to retain the historically validated twelve-member jury as a reinforcement of the principles of democratic participation in government which forms the cornerstone of our Republic. The result may be a bit more expensive but a lot more equitable and just. G. K. Chesterton summed up the importance of the issue before this Court when he said:

> And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
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> Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.

Chesterton, *Tremendous Trifles* (1920). The civil jury is no less dignified than the criminal jury. Any weakening of the foundations of democracy weakens the total structure and threatens our freedom. Preservation of the twelve-member federal civil jury is just that serious. The attempt is made today to cut the jury in half. It is fitting that

Professor Zeisel reminded us in the title of his article that the first step is always the hardest but after that: And then there were none!

Respectfully submitted,

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